

UNITED STATES
v.
CURT L. WILLSIE

IBLA 96-355

Decided May 8, 2000

Appeal from an order of Administrative Law Judge S. N. Willett dismissing mining contest complaint AZA-23448-1 for failure to establish a prima facie case of invalidity for all or parts of four gypsum placer mining claims.

Order reversed; record reviewed de novo; contest dismissed.

1. Administrative Procedure: Burden of Proof--Rules of Practice: Government Contests

When, at the conclusion of the Government's case-in-chief, the contestee moves to dismiss, the administrative law judge does not err in taking the motion under advisement when the contestee is not forced to choose between presenting its case or standing on the motion. If the contestee voluntarily presents its case while the motion to dismiss is pending, the evidence tendered by contestee may properly be considered, not for curing possible deficiencies in the Government's prima facie case, but for the purpose of determining whether this evidence, in the context of all the other evidence of record, will establish the validity or invalidity of its claim.

2. Evidence: Prima Facie Case--Mining Claims: Contests--Mining Claims: Discovery: Generally--Mining Claims: Marketability

Uncontradicted evidence of nonproduction of a mining claim, which has continued over a period of years, may be sufficient, without more, to establish a prima facie case of invalidity of a mining claim. However, the question of whether a prima facie case arises in such circumstances depends on what evidence is offered by the Government regarding nonproduction.

3. Evidence: Prima Facie Case--Mining Claims: Contests--Mining Claims: Marketability

When BLM attempts, through the testimony of its mineral examiner, to establish a prima facie case that the mineral from contested mining claims fails to meet the marketability test, expertise by the mineral examiner as to the particular mineral in question may be demonstrated through evidence of education, training, and experience. Failure to have conducted a mineral examination of a mining claim for the same mineral in the past is not decisive.

4. Evidence: Prima Facie Case--Mining Claims: Con-tests--Mining Claims: Marketability

The ruling by an administrative law judge that BLM could not establish a prima facie case in support of the charges in its contest complaint because the mineral examiner who testified at the hearing was not the "sole participant" in preparing the mineral report will be overturned when the mineral examiner who sampled the mining claims and prepared the draft mineral report died prior to finalization of that report, but the mineral examiner who took over the finalization of the report verified and evaluated the work conducted and prepared a market study, and no issue arose regarding the sampling or other work conducted by the deceased mineral examiner.

5. Mining Claims: Location--Mining Claims: Marketability--Words and Phrases

When a mining claimant has located mining claims embracing mineral deposits of such quantity that only a portion of those deposits is presently marketable at a profit, the remaining mineral deposits have been characterized by the Department as "excess reserves."

6. Evidence: Burden of Proof--Mineral Lands: Determination of Character--Mining Claims: Contests--Mining Claims: Marketability

When BLM charges in a contest complaint that portions of mining claims located for gypsum are not mineral in character on the basis that, although gypsum is present on those portions of the claims, that gypsum was not marketable at the times in question, the issue is whether, in fact, the gypsum could have been extracted and marketed at a profit.

7. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity

The determination of whether or not the Government has presented a prima facie case of invalidity in the contest of a mining claim is made solely on the basis of the evidence introduced in the Government's case-in-chief, which includes testimony elicited in cross-examination. If, upon the completion of the Government's presentation, the evidence is such that, were it to remain unrebutted, a finding of invalidity would properly issue, a prima facie case has been presented and the burden devolves on the claimant to overcome this showing by a preponderance of the evidence.

8. Administrative Procedure: Administrative Review--Board of Land Appeals--Mining Claims: Contests--Rules of Practice: Appeals: Generally

When an administrative law judge has erred in determining that the Government failed to present a prima facie case in support of the charges in a mining claim contest and both parties have presented their cases at the hearing on the complaint, the Board may exercise its de novo review authority and proceed to review all the evidence to decide whether the contestee overcame the Government's prima facie case by a preponderance of the evidence.

9. Evidence: Prima Facie Case--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Marketability

It is not unreasonable in conducting a market assessment following receipt of a patent application for a Government mineral examiner to rely on what the mining claimant has done on the claims and what the claimant has proposed in the patent application for production and marketing the mineral deposits on the claims. However, a prima facie case based on such an assessment is vulnerable to evidence presented by the contestee at a hearing on the complaint showing that a prudent man would not so limit production and marketing and could produce more mineral and market that production without increased costs for additional equipment.

APPEARANCES: Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Jerry L. Haggard, Esq., Kevin M. Moran, Esq., Phoenix, Arizona, for Curt L. Willsie.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has appealed from a March 29, 1996, order issued by Administrative Law Judge S. N. Willett, dismissing BLM's mining contest complaint AZA-23448-1, which challenged the validity of all or part of four association placer mining claims (C&W Nos. 1, 12, 15, and 16) located in 1976 in Mojave County, Arizona, for gypsum. ^{1/} Judge Willett dismissed the contest for failure to establish a prima facie case in support of the charges in the complaint.

Factual and Procedural Background

In 1976, Curt L. Willsie and Delmar Ray Cotton located numerous placer mining claims for gypsum in Mojave County, Arizona, including the claims in question. In February 1984, Southwest Minerals Inc. (Southwest Minerals), a corporation established by Willsie and a partner, submitted a plan of operations to BLM to mine portions of the C&W Nos. 12 and 16 claims. BLM approved the plan on March 14, 1984, and Southwest Minerals commenced production. On August 28, 1984, pursuant to the Arizona Wilderness Act of 1984, Pub. L. No. 98-406, 98 Stat. 1485, the lands embracing the claims in question were withdrawn from mineral entry and designated as part of the Beaver Dam Wilderness Area.

In 1985, BLM geologist Cloyd W. Swapp undertook a mineral examination of portions of the C&W Nos. 12, 15, and 16 to determine if there were valid existing rights to the claims at the time of wilderness designation. ^{2/} He concluded that discoveries of valuable mineral deposits existed on the portions of the claims he examined and that those lands, comprising 80 acres, constituted valid claims as of the date of passage of the Arizona Wilderness Act and as of the date of his report.

^{1/} The C&W No. 1 is located in the S1/2SE1/4SE1/4 sec. 4, the C&W No. 12 in the N1/2NE1/4SW1/4 sec. 3, the C&W No. 15, in the NE1/4SW1/4SW1/4, S1/2SW1/4SW1/4 sec. 3, and the C&W No. 16 in the S1/2SE1/4SW1/4 sec. 3, T. 41 N., R. 14 W., Gila and Salt River Meridian, Unorganized Mining District, Mojave County, Arizona. The total acreage under contest is 90 acres.

^{2/} In his report, dated July 1985, Swapp explained his rationale for examining only 80 acres in three claims, 30 acres of C&W No. 12, 30 acres of C&W No. 15, and 20 acres of C&W No. 16: "In making a field appraisal of this operation, it has been determined that the apparent mineral for the present operation plus a logical progress for the near future is located on that portion of the C&W Claims numbered 12, 15 and 16 as shown on Figure 1. For this reason this validity examination covers this area." (Exh. G-12 at 3.)

However, production from the claims ceased by the end of 1985, and there had been no further production from the claims up to the time of the hearing. Total production from the claims was 10 to 20 thousand tons of gypsum either shipped to Las Vegas for further distribution to cement plants in southern California or directly to the cement companies. (Exh. G-9; Tr. 436-37.)

From 1985 to late 1987, Willsie was engaged in litigation with his Southwest Minerals' partner. By letter dated February 24, 1988, Willsie's counsel informed BLM that a settlement of the litigation had been reached which included a transfer of any right, title, or interest held by Willsie's partner in the claims in question to Willsie.

On May 20, 1988, Willsie filed mineral patent applications with BLM for seven claims, including the four in question. BLM rejected those applications on June 2, 1988, because of various defects in the applications. On August 12, 1988, Willsie filed two new mineral patent applications for the same claims. Later, he withdrew one of those applications and eliminated various acreage from the other application. The remaining application covered 130 acres, including the 90 acres under contest in the present case. As part of the patent application process, Willsie supplied BLM in December 1988 with information estimating the income from and costs of mining and selling gypsum from the contested claims. His estimates were based on his projections that he would be producing 540 tons of gypsum per day during 250 working days a year for a total production of 135,000 tons of gypsum per year. He projected sales of 50,000 tons per year of bulk agricultural grade gypsum, 35,000 tons per year of bagged specification agricultural grade material, and 50,000 tons per year of bagged food grade gypsum. He did not express an intent to enter into any other markets for gypsum.

In response to Willsie's application, John Branch, a BLM geologist in the Arizona Strip Office, St. George, Utah, conducted a validity examination of the 130 acres in the patent application and prepared a draft mineral report. Branch died on June 4, 1991, prior to finalizing his report. (Tr. 93, 263.) Another BLM geologist, Byard L. Kershaw was assigned that task. Kershaw testified that his role was to "verify personal communications that Mr. Branch had had with various individuals in the report, verify his calculations, verify the geology and so forth of the claim area and to finalize the report." (Tr. 93.) Kershaw completed the mineral report on November 2, 1992. That report (1994 Mineral Report) received technical approval by Burrett W. Clay, Chief, Division of Minerals, Arizona State Office, BLM, on March 11, 1994. (Exh. G-9.)

The 1994 Mineral Report restated Willsie's estimates of his production from his operation and his intended markets. The report also described the proposed mining methods, haulage, and processing details as set forth in the patent application. Further, it set forth general market conditions including tonnages of gypsum used in various market sectors such as the manufacture of portland cement, agricultural fillers, and other products.

The 1994 Mineral Report noted that production from Willsie's claims was limited to 1984-1985, during which time between 10 and 20,000 tons of gypsum were sold to cement manufacturers in California. The markets for agricultural gypsum, bagged specification agricultural gypsum, and bagged food grade gypsum were all in existence on August 28, 1984, the date of wilderness designation and withdrawal.

The 1994 Mineral Report compared the operation envisaged in Willsie's application to an ongoing operation, Western Gypsum, located about 10 miles east of Willsie's claims. Western Gypsum produced approximately 50,000 tons per year for the agricultural, cement, food, and pharmaceutical markets. Prices in these markets were reported as \$20 per ton (cement grade), \$24-\$28 per ton (bulk agricultural grade), and \$50-\$110 per ton for the highest grade gypsum (95-97 percent purity) used in the agricultural, food grade, and filler markets. However, as stated in the report, for gypsum of 95 to 97 percent purity, "[t]he actual price paid is determined by the specific grade of the gypsum, the size to which it is ground, whether it is sold as a bagged or bulk product, and whether any transportation charges are included." (Exh. G-9 at 8.) A market also existed for gypsum of at least 98 percent purity for food and pharmaceutical uses. In 1990, an independent processor from St. George, Utah, informed BLM that the "total west coast market" for such a product was from 1,800 to 3,000 tons per year, while a representative of Western Gypsum estimated a market from the St. George area for such uses of between 10 and 20,000 tons per year. Id. at 9. Prices of gypsum for such uses ranged from \$130 to \$140 per ton. Id.

According to the 1994 Mineral Report, Willsie would have a difficult time initially marketing 50,000 tons of agricultural grade gypsum per year, given the lack of his "ability to produce sale contracts or letters of intent to purchase this type of material." Id. at 9. However, it estimated that, if Willsie marketed "gypsum in a combination of both the bulk agricultural and cement markets, the stated level of 50,000 tons of gypsum could be sold per year." Id. It concluded that there was an additional ready market for specification agricultural grade and filler grade gypsum and that it was "reasonable to assume that the stated level of production (35,000 tons per year) could be marketed." Id. Finally, it estimated the food grade gypsum market in the St. George area at between 1,800 and 20,000 tons annually, concluding that, at most, Willsie could market 10,000 tons per year of food grade gypsum.

The 1994 Mineral Report thus concluded that 95,000 tons (50,000 tons for bulk agricultural and cement markets, 35,000 tons for specification agricultural grade and filler grade markets, and 10,000 tons for food grade markets) could be marketed annually, not the 135,000 as projected in the patent application. It included an economic evaluation of equipment, capital and operating costs to mine 95,000 tons annually, utilizing the operational specifics provided by Willsie in his patent submissions. That evaluation showed that bulk agricultural product would be produced at a small loss, but that a significant profit would be enjoyed from "the production of the remaining products." Id. at 18.

The 1994 Mineral Report concluded:

The projected level of production stated in the mineral patent application is 135,000 tons of gypsum per year. At this rate, gypsum mining could continue for approximately 240 years. At the annual rate of production for which there is a demonstrated market, 95,000 tons per year, mining on the claims could continue for some 340 years.

The main pit area developed by mining in 1984 is located within the S1/2 of the C&W No. 12 and the N1/2 of the C&W No. 16 mining claims. If mining were to be conducted on these 40 acres in the same manner as that described above for the entire block, approximately 9,917,250 tons of gypsum could be produced. At a production rate of 95,000 tons per year, this volume represents some 104 years worth of reserves.

Gypsum within the remaining 90 acres under application for patent are without current or prospective value within the foreseeable future. This gypsum is without value as a person of ordinary prudence would not be justified in expending labor and means with a reasonable anticipation of developing a valuable mine. As such, the discovery of a valuable mineral has not been made on the C&W Nos. 1 and 15 mining claims. In addition, valuable minerals do not exist within the N1/2 of the C&W No. 12 mining claim and the S1/2 of the C&W No. 16 mining claim.

Id. at 29.

The 1994 Mineral Report stated that a valuable mine could be developed on the 40-acre parcel but recommended that the C&W No. 1 and C&W No. 15 mining claims be contested for lack of discovery of a valuable mineral deposit, and that the N1/2 of the C&W No. 12 and the S1/2 of the C&W No. 16 should also be contested as nonmineral in character. Id. at 1.

On the basis of the 1994 Mineral Report, BLM issued a contest complaint to Willsie on May 3, 1994, charging lack of discovery of a valuable mineral deposit on the C&W No. 1 claim, described as the S1/2SE1/4SE1/4 sec. 4, and the C&W No. 15 claim, described as the NE1/4SW1/4SW1/4, S1/2SW1/4SW1/4 sec. 3, T. 41 N., R. 14 W., Gila and Salt River Meridian. It also charged that lands in section 3 located as the C&W No. 12 (N1/2NE1/4SW1/4) and the C&W No. 16 (S1/2SE1/4SW1/4) were nonmineral in character. The complaint also noted that a 20-acre portion of the C&W No. 12 claim, described as the S1/2NE1/4SW1/4 sec. 3, and a 20-acre portion of the C&W No. 16, described as the N1/2SE1/4SW1/4 sec. 3, had "been clear listed for patent." (Complaint at 1.) Willsie filed a timely answer denying those charges, and BLM forwarded the complaint and answer to the Hearings Division, Office of Hearings and Appeals, Salt Lake City, Utah.

In a letter to counsel for BLM, dated November 4, 1995, counsel for Willsie requested that BLM reconsider its 1994 Mineral Report on the basis

of an analysis of sections K ("Mineral Production and Marketing") and L ("Economic Evaluation") of the 1994 Mineral Report, dated October 21, 1994, and prepared by George F. Leaming, Ph.D., of the Western Economic Analysis Center, Marana, Arizona. In that analysis, Leaming charged that BLM erred in its market analysis because its listed uses of gypsum in the United States in 1987 comprised only 19 percent of the total consumption of gypsum in the United States during that year, and that BLM "completely ignore[d] the other 81 percent of the market for gypsum." (Exh. G-18, Attachment 1 at 1.) Leaming took issue with the statement in the 1994 Mineral Report that there appeared to be a market for only 95,000 tons of gypsum produced from the area in question. He stated that BLM's omission of over 80 percent of the market for gypsum was "particularly acute, because the use of gypsum as raw material in the manufacture of wallboard and plaster for use in the booming construction markets of Las Vegas, Phoenix and other urban areas of the desert southwest and along the Wasatch Front in Utah represents 80% of the market for gypsum." *Id.* at 2. He concludes: "If the report's estimate of 95,000 tons per year for the uses indicated is correct, then the total market for gypsum produced in the St. George-Arizona Strip area is about five times that much, or 475,000 tons per year." *Id.* Leaming further commented that the economic evaluation was "excessively detailed and probably unnecessary" because, as noted in the 1994 Mineral Report,

another producer in the St. George area, who is using what would be the same production technology as a producer on the Willsie claims, is currently producing gypsum at an operating cost of \$4 per ton * * *. The presence of actual existing data on production costs at a closely comparable mine make the preparation of the detailed (and conjectural) analysis on pages 10 through 17 [of the 1994 Mineral Report] unnecessary and also apparently erroneous since it results in a cost figure that is significantly higher than that which exists in reality.

Id. at 3.

Thereafter, the Arizona State Office, BLM, agreed to undertake a further evaluation and Kershaw prepared a supplemental Mineral Report, dated November 21, 1995 (1995 Mineral Report), and approved November 30, 1995. (Exh. G-18.) Kershaw stated therein that the purpose of the 1995 Mineral Report was to "answer comments received from Dr. George F. Leaming of Western Economic Analysis Center through the applicant's attorney, Mr. Jerry L. Haggard, to analyze additional gypsum markets as requested by Mr. Haggard, and as discussed in Western Economic Analysis Center's submission * * *." (Exh. G-18 at 1.) ^{3/}

^{3/} In a letter to the Arizona State Director, BLM, dated Dec. 16, 1994, Haggard requested that BLM's supplemental mineral report "include an economic analysis of all markets in which the gypsum from the mining claims in the patent application can be marketed." (Exh. C-2.)

In the 1995 Mineral Report, Kershaw investigated three additional markets for gypsum: wallboard, plaster, and Arizona agricultural markets. He found that Willsie had a reasonable prospect of entering the wallboard market, but that there was "no likelihood of entering the Arizona agricultural market." (Exh. G-18 at 17.) He also found "no evidence to suggest a likelihood of entering the plaster market." Id. He concluded that the volume of material contained in the 40-acre parcel identified for patent in the 1994 Mineral Report would be sufficient to support a level of production from that acreage of 135,000 tons per year for approximately 70 years and that such production could reasonably be expected to be absorbed into existing markets. (Exh. G-18 at 1, 12.)

On February 14, 15, and 23, 1996, Judge Willett conducted a hearing on the contest complaint in Phoenix, Arizona. BLM presented two witnesses in support of its case-in-chief: Kershaw and Alvin L. Burch, Group Administrator, Minerals Adjudication Group, BLM Arizona State Office.

Burch is a certified mineral examiner and former minerals training coordinator at the BLM National Training Center in Phoenix, Arizona. (Tr. 19.) Burch's testimony consisted primarily of background information regarding the duties and responsibilities of mineral examiners, the rationale for charging lack of mineral in character for portions of two claims in the contest complaint, the marketing of high volume, low unit value minerals such as gypsum, and his understanding of the term "excess reserves," which he testified

is a term that was coined at one time that applied to the portion of a deposit that could not be absorbed in the market. If it could not be absorbed in the market, then it has no value and therefore it wasn't exploitable.

So using the term excess reserves is almost contradicting one's self. However, the concept that there is a limit to the market, and the concept that sometimes a deposit is so huge that it cannot all be reasonably projected to be absorbed in the market is quite a valid concept.

(Tr. 35.)

Kershaw testified that his role was limited to verifying the field information in the 1994 Mineral Report (Tr. 95) and that no sampling, other than that by Branch, was performed. Kershaw reviewed and discussed the sampling done by Branch. (Tr. 117; Exh. G-9 at 18.) The consensus of BLM opinion was that the 1994 Mineral Report was adequate. (Tr. 97.) He stated that 40 acres (C&W No. 12, S1/2, C&W No. 16, N1/2) were recommended for patent, but that patent had not issued. (Tr. 108.)^{4/}

^{4/} However, Willsie noted in his answer on appeal at page 8 that on Apr. 15, 1996, BLM issued Patent No. 02-96-0014 to him for that 40 acres.

Kershaw visited the claims on several occasions to verify sample points, geology, and survey monuments. He located a pit of about 15 acres on the S1/2 of the C&W No. 12 and the N1/2 of the C&W No. 16 claim, in the area recommended for patent. (Tr. 133, 134-35.) He said that this parcel was selected for patent because of the pit. (Tr. 284.)

Kershaw testified that Willsie's markets would have been the "bulk and bag agricultural grade markets, filler grade markets, food and pharmaceutical grade markets," all of which existed in 1984. (Tr. 152; Exh. G-9 at 1, 9.) Kershaw thought that Willsie, having sold to the portland cement market in 1984, could again enter that market. (Tr. 162.)

Kershaw also testified that BLM examined operational costs, including capital outlay, labor, processing, and transportation. (Tr. 171.) He repeated the 1994 Mineral Report conclusions dividing the claims into invalid and valid discovery areas. (Tr. 177; Exh. G-9, at 1, 29-30.)

Kershaw stated that in preparation for his 1995 Mineral Report he contacted gypsum producers, suppliers, and manufacturers of gypsum products in California, Nevada, Utah, Colorado, New Mexico, and Arizona, among others, to determine the geographic extent of the markets and the amounts of gypsum that could reasonably be absorbed into those markets. His findings, after his market analysis, were as follows:

The wallboard market, other than one plant near Las Vegas, is vertically integrated with no probability of entry.

There is a likelihood of successful entry into the wallboard market in Apex (Las Vegas), Nevada at an estimated 40,000 tons per year.

The cost of transportation prohibits entry into the Arizona agricultural market.

There is no evidence to suggest that the Willsie deposit meets the color requirements for entry into the plaster market.

The 40 acres recommended for patent contains 9,917,250 tons of gypsum. At 135,000 tons per year, the 40 acres recommended for patent would sustain production for approximately 70 years.

Id. at 14.

In his conclusions, Kershaw confirmed the economic analysis in the 1994 Mineral Report. His additional research indicated that Willsie had a reasonable prospect of entering the wallboard market, but no likelihood of entering the Arizona agricultural market or the plaster markets. (Exh. G-18 at 17.) Kershaw recommended that "patent be issued on the 40 acre parcel identified in the [1994 Mineral Report]" and that contests be initiated on the remaining portions of the claims as nonmineral in character. Id. at 2.

Kershaw testified, with reference to a "preprint" of the Bureau of Mines Minerals Yearbook for 1987 (Exh. G-19), that the wallboard market represented approximately 80 percent of the market and that the remaining markets evaluated in the 1994 Mineral Report represented approximately 20 percent. (Tr. 180.) He affirmed that there were no sales invoices, contracts, letters of agreement, or other documents, that would support a conclusion that Willsie could reach a production rate of 135,000 tons of gypsum per year. (Tr. 185-86.) Kershaw characterized BLM's recommendation for patent of 40 acres as "generous," in view of the "lack of any indication that production will occur or lack of indication that any production is currently occurring * * *." (Tr. 195.)

On cross-examination, Kershaw acknowledged that he had never performed a validity examination on a gypsum mining claim (Tr. 210), and that he had no first-hand knowledge of how thoroughly Branch reviewed the available literature. (Tr. 213.)

Kershaw calculated that there are 32 million tons of gypsum on the total claim area of 130 acres. (Tr. 369; Exh. G-9 at 29.) He accepted Willsie's proposal to mine 135,000 tons per year as reasonable. (Tr. 339.) Kershaw explained that his designation of portions of the claims as nonmineral in character derived from his opinion that the minerals in those portions of the claims could not be reasonably marketed. (Tr. 285; Exh. G-9, at. 1.) He offered his opinion that the C&W Nos. 1 and 15 claims were invalid because the market could not absorb the quantity of material on those claims. (Tr. 286.) He also stated, however, that he did not apply the so-called "excess reserves" test in his amplification of the 1994 Mineral Report. (Tr. 367, 373.) Rather, he stated that the gypsum on the claims he recommended for contest did not meet the marketability test. (Tr. 368, 374.)

At the conclusion of the presentation of BLM's case-in-chief, Willsie moved to dismiss the complaint, alleging failure to present a prima facie case. (Tr. 385-86.) Judge Willett took the motion under advisement and set a schedule for the filing of briefs arguing the motion. (Tr. 389-91.) Willsie then presented his case, based on his own testimony and that of two other witnesses: Carol Ann Trissell Stull, an administrative assistant in counsel's law office, and Gordon T. Austin, a minerals consultant and former employee of the Bureau of Mines, U.S. Department of the Interior.

On March 29, 1996, Judge Willett issued an order granting Willsie's motion and dismissing the contest. She concluded that no prima facie case had been presented of the lack of discovery of a valuable mineral deposit on the C&W Nos. 1 and 15 or of the nonmineral character of the N1/2 of the C&W No. 12 and the S1/2 of the C&W No. 16, as charged in the contest complaint. BLM filed a timely appeal.

Judge Willett's Order

In her order concluding that BLM had failed to present a prima facie case, Judge Willett rejected BLM's argument that lack of production from the claims was sufficient to establish a prima facie case of invalidity.

She found the testimony of the Government's witnesses insufficient to establish a prima facie case for two reasons. First, she ruled, relying on Rodgers v. Watt, 726 F.2d 1376, 1380 (9th Cir. 1984), that neither Government witness was an expert in or had training in the marketing, mining, or processing of gypsum, and, for that reason, their testimony could not serve as the basis for a prima facie case. Second, she found the Government's testimony defective because Kershaw was not the "sole participant" in the preparation of the 1994 Mineral Report. She held: "The technical portion of the report which combines with the marketing studies done by Mr. Kershaw was done by a third party mineral examiner, now-deceased. This factor also prevents affording prima facie weight to the witness's testimony which encompasses the 1994 report as a basis for finding lack of discovery." (Order at 3.)

Although Judge Willett stated that "[n]ormally, having made the above findings, examination of other issues would not be required," she proceeded to discuss other reasons why she believed the Government failed to present a prima facie case. (Order at 3.) She found confusing the Government's arguments that a lack of market for the additional quantity of material in the contested portions of the C&W No. 12 and 16 claims supported a finding of nonmineral in character. She accepted Willsie's argument that the only evidence that would support a nonmineral in character finding would be evidence showing that the gypsum deposit was not present on any 10-acre tract of the contested acreage in the C&W No. 12 or 16 claims or that the deposit on the contested acreage on those claims was significantly different in its occurrence so as to make it economically unfeasible to mine, neither of which she found to have been shown by the Government's evidence.

She stated that "[i]t is manifest that the government's challenge is against claiming too much land for mining claims," and that this was "[s]omething that Baker [United States v. Baker, 613 F.2d 224 (9th Cir. 1980)] said cannot be done." (Order at 5.) She held that this Board's decision in United States v. Oneida Perlite Corp., 57 IBLA 167, 88 I.D. 772 (1981), which had explained the Baker decision and the term "excess reserves," did not apply to the present case because "the mineral bodies evidenced by the contested claims in this action do not as in Perlite constitute imponderable reserves exceeding[,] even defying[,] the concept of marketability." (Order at 5.) She stated: "The term 'superabundant' is the key to that decision." Id.

Judge Willett found fault with the Government's market analysis because Kershaw sought information regarding the marketability of gypsum "from sources with whom the Contestee ultimately would be in competition and who therefore have reasons to provide information selectively." (Order at 6.) She found the persuasiveness of such data to be lacking. Finally, she stated that the Government had "subjectively assigned a flat 135,000 tons per year share of the regional market" to Willsie and that it was "this allocation or limitation that runs up against the express prohibition in Baker and constitutes in practice, regardless of the name assigned it, the 'too much' rule." (Order at 6.) According to Judge Willett, "the conclusions reached as to market absorption/market share by the process engaged in was [sic] arbitrary." Id.

Arguments and Discussion

[1] BLM's first argument is that it was reversible error for Judge Willett to take Willsie's motion to dismiss under advisement at the hearing. In Angeline Galbraith, 134 IBLA 75, 107 (1995), we stated that "a contestee cannot fairly be forced to decide whether to present his or her own evidence or rely on the failure of the Government to present a prima facie case in the absence of a ruling by the judge on the motion to dis-miss." We noted further that only "after [a ruling on a motion to dismiss] has been entered can a contestee be fairly forced to choose between presenting additional evidence or standing on the motion * * *." See United States v. Miller, 138 IBLA 246, 269 (1997).

As correctly pointed out by Willsie, the rule established in Galbraith was intended as a protection for contestees. As such, BLM may not seek to benefit by it. Willsie has not asserted any prejudice by Judge Willett's action. In fact, he asserts that he was not compelled to present his evidence, but, instead, did so voluntarily after the parties had set a briefing schedule on the motion to dismiss. (Tr. 391.) Accordingly, although it was error for Judge Willett to take the motion to dismiss under advisement, it is not an error that may be asserted by BLM.

BLM argues that a consequence of Willsie's determination to present his case is that his evidence may be used in establishing the Government's prima facie case. The law is otherwise. The Board has noted on numerous occasions that, even if the Government has failed to present a prima facie case, evidence tendered by a contestee may be considered, not for the purpose of curing any of the deficiencies in the Government's prima facie case, but for the purpose of determining whether or not this evidence, when considered in the context of all of the other evidence of record, affirmatively established that the claim is invalid. See, e.g., United States v. Miller, *supra* at 269-71; United States v. Knoblock, 131 IBLA 48, 82, 101 I.D. 123, 141 (1994); see also United States v. Opperman, 111 IBLA 152, 153 (1989). As we stated in Miller at 271:

This is a critical distinction. Thus, we noted in Pool that:

[T]he mere fact that the contestee elects to proceed with the presentation of his case does not mean that he therefore must preponderate on the issues raised in the contest. The requirement of preponderation only arises as to issues for which the Government has presented a prima facie case. Where there is no prima facie case, there can be no issue on which a claimant must preponderate. The only risk that the claimant runs is the risk that the evidence as a whole will prove that an element of discovery is not present.

[United States v. Pool, 78 IBLA 215, 220 (1984)] at 220. See also United States v. Opperman, 111 IBLA 152, 153 (1989),

("[I]f the contestee goes forward after the Government rests its case, any testimony presented by the contestee which is adverse to its interests may be utilized by the Administrative Law Judge for purposes of making a decision. However, such testimony can never be the basis for a finding that the Government did not establish a prima facie case.")

Thus, the risk to a contestee in proceeding after a motion to dismiss is taken under advisement is not that the evidence presented may be used to establish the Government's prima facie case, but that the evidence taken as a whole will establish the invalidity of the claim. On the other hand, the contestee may wish to proceed because the evidence may establish the validity of the claim.

In this case, Judge Willett concluded that the Government failed to establish a prima facie case, and granted the motion to dismiss. We will examine that conclusion in light of the Government's evidence.

[2] BLM argues that Judge Willett's order should be reversed because a prima facie case can be established on the basis of evidence of lack of production. BLM complains that under Judge Willett's analysis "all that a claimant need do is apparently have some development work and production at some point in the past. The United States is then precluded from using any subsequent period of nonproduction, no matter how long, as grounds to establish a prima facie case. This is not the state of the law." (Statement of Reasons (SOR) at 38-39.)

There is no question that the Government may establish a prima facie case of lack of discovery of a valuable mineral by showing lack of production. In United States v. Hess, 46 IBLA 1, 7 (1980), the Board stated:

Finally, we turn to the question whether the absence of development, over a considerable period of time, may serve to establish a prima facie case of invalidity. We are fully cognizant of the thesis that production is not a precondition of establishing a discovery of a valuable mineral deposit. But it is too late to gainsay the proposition that the failure to produce gives rise to a presumption of invalidity. See United States v. Zweifel, 508 F.2d at 1156, n.5 (10th Cir. 1975). The question which is presented is whether this presumption rises to the level of a prima facie case. We believe that this question must be answered in the affirmative.

We further stated in Hess, however, that while proof of the fact of nondevelopment may establish a prima facie case,

such a prima facie case is the weakest that the Government can establish. The assertion by a mining claimant of a reasonable justification for nondevelopment would defeat the presumption that arises therefrom, and thus effectively rebut the Government's case, resting solely on such a presumption, and require the dismissal of the contest.

Id. at 8.

The question of whether a prima facie case arises in such circumstances depends on what evidence is produced by the Government regarding nonproduction. In this case, Kershaw testified that, during the period 1984-85, 10,000 to 20,000 tons of gypsum were produced from the claims for the California cement market. The 1994 Mineral Report indicates that title to the claims was in dispute from April 1985 until December 1987, at which time "Willsie was determined to be the sole owner of the mining claims." (Exh. G-9 at 2-3.) Willsie filed the patent application in 1988. In addition, evidence presented by the Government showed that high quality gypsum was present on all the claims and that gypsum of such quality was marketable at the time of wilderness designation of the lands and at the time of the hearing. Judge Willett correctly concluded that such evidence failed to establish a prima facie case of lack of discovery based on nonproduction. 5/

[3] BLM contends that the testimony of Kershaw was sufficient to establish a prima facie case of lack of discovery of a valuable mineral deposit. BLM argues that Judge Willett erroneously ruled that no prima facie case was established because the Government's witnesses were not experts, through training or experience in the marketing, mining, or processing of gypsum, citing Rodgers v. Watt, *supra*. BLM asserts that its mineral examiners are, by necessity, generalists. Kershaw, it asserts, is a certified mineral examiner, as well as a certified review mineral examiner. It claims that he testified as to his expertise in marketability of mineral commodities and economic analysis of mining, processing, and transportation estimation.

The court in Rodgers, *supra* at 1380, stated that "this court has made clear that the testifying mineral examiner must be an expert as to the marketability or value of the particular mineral." The two cases cited by the court as supporting that proposition are Verrue v. United States, 457 F.2d 1202, 1204 (9th Cir. 1972), and Charleston Stone Products Co. v. Andrus, 553 F.2d 1209, 1213-14 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 604 (1978). Both of those cases involved mining claims located for sand and gravel in the Las Vegas area. In each case, the court concluded that the decision of the Secretary was not supported by substantial evidence, and in each case the court found the testimony of the Government's witnesses concerning marketability to be deficient because of their lack of personal knowledge of the market for sand and gravel during the critical time period. Neither decision imposed a requirement that the Government's witnesses be "experts" in the marketing of sand and gravel.

Likewise, the quoted language from Rodgers must be read in light of other language in the court's opinion. Examination of the facts in Rodgers, which involved the location of mining claims for sunstones, shows that one Government witness "had no expertise in marketing and had never

5/ Even assuming we were to find that a prima facie case of lack of discovery had been established by lack of production, such a case would have been easily overcome by Willsie's testimony, set forth *infra*, establishing a reasonable justification for failing to produce gypsum from the claims after 1985.

before conducted a marketing survey," while the testimony of the other "was similarly deficient." 726 F.2d at 1380-81. Clearly, that is not the situation in the present case.

Kershaw, a geologist by education, attended a 4-month training course at the BLM Training Center in Phoenix, which included a significant minerals program and a 6-week mining claim validity examination procedures course. (Exh. G-6; Tr. 71-72.) He received additional training in cost estimation and economic analysis. (Tr. 73.) He had previously conducted a mineral examination and had assisted in others. (Tr. 74-75.) While he had never conducted a mineral examination of a gypsum claim, he did review "the plan of operations that authorized the Georgia-Pacific wallboard plant at Apex, Nevada, while [he] was stationed in Las Vegas." (Tr. 211.) Kershaw's education, training, and experience were sufficient to allow him to offer an expert opinion on the marketability of gypsum from the claims in question.

[4] Judge Willett also ruled that, even assuming the requisite experience with gypsum, Kershaw's testimony was deficient because, as the author of the 1994 Mineral Report, he

was not the sole participant in report preparation. The technical portion of the report which combines with the marketing studies done by Mr. Kershaw was done by a third party mineral examiner, now-deceased. This factor also prevents affording prima facie weight to the witness's testimony which encompasses the 1994 mineral report as a basis for finding lack of discovery.

(Order at 3.)

Branch, the author of the draft mineral report, died prior to finalization. Kershaw took over the task of finalizing the report. He verified and evaluated Branch's work and prepared a market study. In considering the issue, Judge Willett did not engage in any analysis of Kershaw's work on the report or point out any error in that work. She merely concluded that because Kershaw was not the "sole participant" in preparing the report that his testimony alone could not establish a prima facie case. While there could be a situation where failure of the Government to offer the testimony of all persons involved in a mineral examination would jeopardize its prima facie case, this is not it. Kershaw was competent to provide testimony regarding the findings and conclusions incorporated in the 1994 Mineral Report and his testimony revealed a knowledge of gypsum uses, valuation, and marketing. Moreover, no issue was raised regarding the mineral sampling or other work conducted solely by Branch.

We hold that it was error for Judge Willett to conclude that the Government could not establish a prima facie case of lack of discovery of a valuable mineral deposit in this case because only Kershaw testified regarding the preparation of the 1994 Mineral Report.

BLM also alleges error in Judge Willett's characterization that the Government's nonmineral in character charge amounted to a challenge that

Willsie was claiming too much land in the C&W Nos. 12 and 16 mining claims, which she held was prohibited by the Baker case. Judge Willett failed to understand BLM's argument regarding its charge of nonmineral in character and her reliance on Baker is misplaced.

[5] Judge Stuebing, in his decision in Unites States v. Oneida Perlite, supra, provided the history of the Department's use of the concept of "excess reserves" and undertook a comprehensive analysis of the Baker decision and a decision of the same court handed down only 5 months later, McCall v. Andrus, 628 F.2d 1185 (1980), cert. denied, 450 U.S. 996 (1981). His decision highlighted the misperceptions of the Baker court:

Where a single claimant or association of claimants locates multiple claims for far more mineral than the market can absorb the test of the validity of each claim is precisely the same [as where multiple claimants have located multiple claims]. * * * Assuming that the single locator does have, at present, a profitable market for a limited amount of material which can easily be supplied from one claim, the question of the value of the deposits of the same mineral on the rest of the claims necessarily arises. Usually, the claimant asserts that the additional claims are needed as a reserve supply in order to continue his operation when the supply on the first claim is exhausted or severely depleted. This Board has recognized repeatedly the right of a mining claimant to locate claims containing valuable deposits of mineral and to hold them, without development, as "reasonable reserves." See, e.g., United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); United States v. Harenberg, 9 IBLA 77, 80 (1973).

* * * * *

But where a claimant has located multiple claims embracing deposits of mineral so vast that the limited market for that mineral, reasonably projected for growth, could not be expected to absorb it over the course of hundreds or even thousands of years, we have held that such an appropriation of public land cannot be justified under the mining laws as necessary "reasonable reserves." Instead we have characterized such locations as "excess reserves," a term which the Ninth Circuit has disdained in favor of its own descriptive phrase "the too much test" (always italicized by the [Baker] Court). The reserves are in excess of the ability of the market to absorb them and, correspondingly, in excess of the claimant's need of them for any legitimate purpose under the mining law.

57 IBLA at 181-83, 88 I.D. at 780-81 (footnote omitted).

Historically, the Department's concern for the location of claims for excess reserves has been

geologically limited to those types of minerals which occur in such abundance that only a small portion of the known deposits

can be absorbed by the market at a profit. Minerals for which there is virtually unlimited demand, such as precious metals, and which can be extracted and sold at a profit, of course would not be the subject of such concern.

57 IBLA at 193, 88 I.D. at 786.

In the Baker case, the court stated at 613 F.2d at 229:

The too much rule is, in our view, a wholly unreliable subjective analysis, resting too much in the eye of the administrative beholder.

The IBLA exceeded its discretionary and statutory powers when it adopted its too much or excess reserves rule. Although Congress may see fit to deal with the issue, it has never done so. The IBLA decision amounts to a legislative enactment by an executive tribunal. The IBLA possesses no such authority under our system of separation of powers.

Judge Stuebing responded by explaining that the concept of "excess reserves" was not an invention of the Board of Land Appeals:

[A] reference to "excess reserves" does not describe a new rule of law invented by this Department, or a super imposition of a new test of a claim's validity on the existing law. It is nothing more or less than a descriptive phrase applicable to a particular set of circumstances. It describes the location of claims for far more land and mineral than reason and prudence would allow because there is such a superabundance of the material that the market simply cannot accept all of it at a profit. Therefore, some of the deposits must be regarded as not valuable in an economic sense. This concern for excess reserves is rooted in the basic statute, 30 U.S.C. § 22 (1976), and controlled by the "prudent man" test of discovery as complemented by the requirement that the economic value of the deposit be measured by a determination of whether it is presently marketable at a profit. United States v. Coleman, [390 U.S. 599 (1968)]. In the making of this determination, it is appropriate to consider the quantity of the claimant's other holdings of this same mineral, and the limitations of the market, and the claimant's share of that market. Clear Gravel Enterprises v. Keil, [505 F.2d 180 (9th Cir. 1974), cert. denied, 421 U.S. 930 (1975)]. It is also appropriate to consider the magnitude and sources of other supplies of that mineral to the same market. Melluzzo v. Morton, [534 F.2d 860 (9th Cir. 1976)].

The authority of the Department of the Interior to make such determinations has been reiterated frequently. See, e.g., Ideal Basic Industries v. Morton, [542 F.2d 1364 (9th Cir. 1976)] at 1367.

57 IBLA at 195, 88 I.D. at 787-88.

In McCall v. Andrus, *supra*, the court affirmed this Board's decision in United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972), that portions of various mining claims located for sand and gravel were invalid because those lands were nonmineral in character. Judge Stuebing explained that the McCall court recognized that the Department had granted McCall patents to public lands containing a 100-year reserve supply of sand and gravel; that McCall offered no evidence of a market for more material; that without an expanded market it was not economically feasible to produce additional material from the contested tracts; and that consequently the material on those contested tracts was without value as mineral. United States v. Oneida Perlite Corp., 57 IBLA at 206, 88 I.D. at 794. Judge Stuebing then referenced the McCall court's explanation of the proper test for determining whether land is mineral in character. That court, quoting from Diamond Coal and Coke Co. v. United States, 233 U.S. 236, 239-40 (1914) (a case concerning whether land claimed as a homestead was mineral land not subject to homestead claims) stated that the test was whether "the known conditions at the time of [the patent] proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." 628 F.2d at 1188. 6/

The McCall court attempted to distinguish the Baker case, stating that "[u]nlike Baker, here the character of the land claimed was contested. The claims which were held invalid here were all covered by caliche material. The hearing examiner noted that it was not economically

6/ The Board discussed the interrelationship of the terms "excess reserves" and "mineral in character" in United States v. Williamson, 45 IBLA 264, 293-94, 87 I.D. 34, 50 (1980), in which we stated:

"Mineral in character and excess reserves can be seen as differing facets of a single concept. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. United States v. Meyers, 17 IBLA 313 (1974); United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972). The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. As such, it is the normal adjunct to a charge of no discovery. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character. Id. Thus, to the extent that a placer claim embraces 10-acre subdivisions which do not have the located mineral present, those portions which are nonmineral will be declared null and void.

"Questions relating to excess reserves, though they are interrelated to a determination of the mineral character of land, arise in a different context. The charge of invalidity due to the presence of excess reserves admits that the mineral, qua mineral, exists within additional claims, but raises the contention that because of the quantity of mineral in other claims owned by a mining claimant, the mineral in certain claims would have no market and thus is essentially valueless." (Headnote numbers omitted.)

feasible to extract the type of material on these tracts since there were large deposits of easily removable sand and gravel on the other tracts." 628 F.2d at 1189.

Judge Stuebing commented:

The [McCall] Court has thus approved a finding by this Board that claims to lands on which there are mineral deposits which exceed the ability of the market to absorb at a profit are invalid because such lands are "nonmineral in character," but rejected a similar finding where such deposits were characterized as "excess reserves."

United States v. Oneida Perlite Corp., 57 IBLA at 204, 88 I.D. at 793. Thus, Judge Stuebing pointed out the fallacious reasoning indulged in by the Baker court and the weakness of the McCall court's distinction. He summarized at 208-209, 88 I.D. at 795:

Both terms [excess reserves and nonmineral in character] relate to the absence of a "valuable" deposit of mineral. In both Baker and McCall the claimants had applied for patents, and patents had been approved covering vast amounts of materials on some of the lands applied for. However, as declared in Barton v. Morton, 498 F.2d 288, 292 (9th Cir.), cert. denied, 419 U.S. 1021 (1974):

But there are other considerations. A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. The requirement that actual discovery of a valuable mineral deposit be demonstrated gives weight to this consideration.

In sum, the terms "mineral in character" and "nonmineral in character" refer to the land which is the subject of the claim, while the terms "excess reserves" and "reasonable reserves" refer, in certain circumstances, to the deposit of mineral which serves as the object of the claim. All of these expressions relate to whether or not there has been a qualifying discovery of a valuable deposit of mineral on that particular claim or portion thereof.

[6] Judge Willett would apply the McCall case only where "physical conditions prevent the extraction of an abundant material at an economically feasible level." (Order at 5.) There is no such limitation to the application of McCall. In fact, by charging that portions of the C&W Nos. 12 and 16 claims were nonmineral in character, BLM was proceeding in a manner endorsed by the court.

In McCall the Government applied the 10-acre rule, which allows for the elimination of aliquot 10-acre portions of lands which are nonmineral in character from otherwise valid placer mining claims, to portions of claims because the lands in those portions of the claims contained unmarketable, valueless sand and gravel. In this case, the Government likewise charged that portions of the C&W Nos. 12 and 16 mining claims were nonmineral in character because it believed that the gypsum deposits in those portions of the claims were unmarketable, the reason being that the other portions of those claims approved for patent provided "reasonable reserves" sufficient to supply the market for years to come. 7/

Far from "disparate and disconnected," as characterized by Judge Willett in her order at 4, BLM's arguments regarding various lands in the C&W Nos. 12 and 16 claims being nonmineral in character are straightforward. BLM attempted to show in the presentation of its case that certain portions of the C&W Nos. 12 and 16 claims were nonmineral in character because the gypsum on those portions of the claims was not presently marketable due to the abundant nature of that mineral and the limitations on the market.

Judge Willett would limit the application of the Oneida Perlite case. She stated: "The term 'superabundant' is the key to that decision." (Order at 5.) Presumably, she found that the gypsum on Willsie's claims was not "superabundant," so that Oneida Perlite was not applicable. This was error. The question is not "superabundance" per se; the question is whether the mineral upon which a claimant bases the location may be extracted and marketed profitably. Moreover, to the extent Judge Willett may have determined otherwise she did so based on the entire hearing record and not only on the Government's case, which she was limited to in determining whether or not a prima facie case had been established to support the charges in the complaint.

It was clear from the Government's case at the hearing that its charges were based on its belief that the 40-acre tract approved for patent, which embraced portions of the C&W Nos. 12 and 16 claims, provided adequate material to supply the gypsum market and contained reasonable

7/ The parties have devoted considerable briefing to the effect of Solicitor's Opinion, M-36984, "Excess Reserves Under the Mining Law," issued on Mar. 22, 1996, during the pendency of this proceeding. In that opinion, rendered in response to a request for guidance from the BLM California State Office concerning a deposit of common cinders in Inyo County, California, the Solicitor stated at page 1: "[W]hether excess reserves exist is a fundamental element in the marketability test and must be considered in a mineral report. Excess reserves, by definition, are not presently marketable and, therefore, cannot support a valid mining claim."

BLM asserts that that opinion is binding on this Board. Willsie argues vigorously that it is not. We need not decide the issue because that Solicitor's Opinion is nothing more than a restatement of what the law is regarding excess reserves. Judge Stuebing addressed that concept in Oneida Perlite. However, we note that the Solicitor's Opinion was neither approved by the Secretary nor published in "Decisions of the United States Department of the Interior."

reserves for Willsie's operation. The Government charged that the remaining portions of the two claims approved for patent were nonmineral in character, arguing that the gypsum on those portions could not be extracted and marketed at a profit. It also charged lack of discovery of a valuable mineral deposit on the other two claims (C&W Nos. 1 and 15), asserting that the gypsum on those claims could not be extracted and marketed at a profit.

[7] The determination of whether or not the Government has presented a prima facie case of invalidity in the contest of a mining claim is made solely on the basis of the evidence introduced in the Government's case-in-chief, which includes testimony elicited in cross-examination. If, upon the completion of the Government's presentation, the evidence is such that, were it to remain un rebutted, a finding of invalidity would properly issue, a prima facie case has been presented and the burden devolves on the claimant to overcome this showing by a preponderance of the evidence. United States v. Knoblock, supra at 81-82, 101 I.D. at 141; United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974). It is accordingly necessary to review the evidence presented by the Government, some of which we have set forth above.

In the 1994 Mineral Report, BLM stated that the four claims evaluated in the report contained, in toto, an estimated 32.5 million tons of gypsum. Kershaw testified that the operation evaluated in the 1994 Mineral Report was the one proposed by Willsie which would produce 135,000 tons of gypsum per year to be marketed as approximately 50,000 tons of bulk agricultural grade gypsum, 35,000 tons of bagged specification agricultural gypsum, and 50,000 tons of bagged food grade gypsum. (Tr. 139, 147; Exh. G-8.) Even though not proposed by Willsie, Kershaw considered the market for gypsum for use by cement manufacturers as an additive in cement because sales were made to that market in 1984 and 1985 from the claims. (Tr. 161-62; Exh. G-8 at 7.) Kershaw testified that at the time of the withdrawal of the land in question there was not a regional market for the use of gypsum for wallboard. (Tr. 156.)

Prior to the hearing, Willsie did not provide any documentary evidence to support his claimed production level of 135,000 tons per year. Therefore, in order to evaluate the likelihood of market entry, Kershaw looked "at other operations in the region and their ability to supply the markets in the region and the level they were supplying the markets." (Tr. 157.) 8/ In the 1994 Mineral Report, Kershaw identified a market for

8/ Judge Willett found fault with Kershaw's methodology stating: "The government's case manifestly shows that the gypsum industry treats much of its market information like state secrets. This does not bode well for integrity of data obtained from occasional or non-published sources both of which were used by the individual performing the market studies. The persuasiveness of such data is lacking." (Order at 6.) First, there is no evidence to support Judge Willett's assertion regarding "state secrets." Were that the case, virtually all sources of marketing information for gypsum, both published and unpublished, would be subject to the same asserted deficiency. Second, we find no error in the methodology employed by BLM in determining market information.

use in cement in Victorville, California (200,000 tons per year), and in Riverside and Mojave, California (for unspecified amounts), for agricultural use in Hanford, California (250,000 tons per year), and Los Angeles, California (for unspecified amounts), and for food and pharmaceutical use in St. George, Utah (10,000 to 20,000 tons per year). He determined that market entry was possible for Willsie for 95,000 tons of gypsum per year: 25,000 tons in the portland cement market, 25,000 tons in the bulk agricultural grade market, 35,000 tons for the bagged agricultural and filler grade market, and 10,000 tons in the food and pharmaceutical market. (Tr. 169.)

In the 1995 Mineral Report, Kershaw analyzed the market for gypsum used for making wallboard by contacting 11 wallboard manufacturers in 5 different states, in each case asking to speak to someone who had knowledge of the source of gypsum supply for their individual plant and inquiring of that person whether the plant bought gypsum from outside sources. (Tr. 223-28; Exh. G-18 at 5.) He was told that seven of those plants had their own quarries and did not purchase gypsum from outside sources. Two plants purchased their gypsum from Mexico, and the source of supply for one other plant was Indian leases. Only 1 of the 11, the Georgia-Pacific plant in Apex, Nevada, near Las Vegas, purchased gypsum from outside sources. (Exh. G-18 at 9-11.) Kershaw concluded that, based on the processing plant projected by Willsie, Willsie could enter the wallboard market by selling 40,000 tons per year of gypsum to the Georgia-Pacific plant. Id. at 12. He also concluded in the 1995 Mineral Report that it was unlikely because of transportation costs that gypsum from the claims could compete in the Arizona agricultural market. Id. at 13. He found no evidence of a market for gypsum from the claims for use in the plaster market. Id. at 14.

He further concluded that the volume of gypsum contained in the 40 acres recommended for patent, which he estimated to be approximately 9.9 million tons, was sufficient to support the level of production discussed in the 1995 Mineral Report (135,000 tons per year) for approximately 70 years. (Tr. 193.)

On cross-examination, Kershaw testified that the recommendation to patent only 40 of the 130 acres was based on his conclusion that only 135,000 tons per year "could be reasonably expected to be absorbed into the market." (Tr. 268.) While admitting that there existed a market in excess of 660,000 tons per year for gypsum in the vicinity of the claims, Kershaw stated on cross-examination that Willsie should be limited to 135,000 tons per year because of the information Willsie submitted to support his patent application. (Tr. 233, 248.) Nevertheless, when he was asked whether the prudent person test applied to the particular individual involved in a proceeding (in this case Willsie) or to a hypothetical prudent person, Kershaw responded: "It's an ordinary prudent person, not the specific individual." (Tr. 249.)

Kershaw further testified that, while the 40 acres recommended for patent contained 9.9 million tons of gypsum, they also contained an equal amount of dolomite, which constituted waste material. He estimated that waste storage could be limited to one 10-acre parcel of the 40 acres, but

that the gypsum could be mined from that area prior to commencing the waste storage. (Tr. 273-77.) He admitted that such a procedure would entail moving some of the waste material twice. (Tr. 276.)

On cross-examination Willsie attacked Kershaw's testimony regarding the market for gypsum from the claims because Kershaw had relied on the operation proposed by Willsie and the previous operation on the claims in assessing marketability. As we have stated in relation to the establishment of a prima facie case on the basis of lack of production from a mining claim: "This rule reflects the principle that, given the varying economic conditions present over a period of many years, a mining claim will usually be developed unless it is not commercially feasible to do so profitably. In other words, the best evidence of what a prudent man would do is what a prudent man has done." United States v. Knoblock, supra at 88, 101 I.D. at 144. Although we have rejected BLM's argument that the lack of production from the claims in question from 1985 to the date of the hearing itself supported a prima facie case of the charge of lack of discovery, we believe it was not unreasonable in the first instance for Kershaw to have relied in this case on what Willsie had done on these claims and what he proposed to do in the future.

We conclude, based on our review of the testimony of the Government's witnesses and documentary evidence produced by it, including Willsie's cross-examination of the witnesses, that the Government established a prima facie case in support of the charges in the contest complaint. Judge Willett's conclusion to the contrary is based on a misunderstanding of the applicable law and an erroneous application of the facts. Her order is reversed for that reason.

[8] BLM asserts that Judge Willett's order should be overturned and "this matter remanded to the Hearings Division for briefing and decision on the merits of the contest complaint." (SOR at 70.) While we have reversed Judge Willett's order, we find that it is unnecessary to remand this case to the Hearings Division for a decision on the merits. Following Judge Willett's ruling taking Willsie's motion to dismiss under advisement, Willsie proceeded to present his case. Accordingly, the record in this case is complete.

The Board of Land Appeals, as the delegate of the Secretary of the Interior, has the authority to make decisions concerning appeals relating to the use and disposition of the public lands and their resources as fully and finally as might the Secretary himself. 43 C.F.R. § 4.1. We have previously held that:

This authority includes the power to make a de novo review of the entire administrative record and to make findings of fact based thereon. While we recognize the propriety of deferring to the Administrative Law Judge's findings where a witness' demeanor affects his credibility, our authority to make findings of fact which may differ from the former's is not limited by the substantial evidence rule * * *. "On appeal from or

review of the initial decision, the agency has all the powers which it would have in making the initial decision * * *"
5 U.S.C. § 557 [(1994)]. (Emphasis original).

United States v. Dunbar Stone Co., 56 IBLA 61, 68 (1981), aff'd, No. 81-1271 PHX EHC (D. Ariz. Feb. 27, 1984), aff'd, No. 84-1915 (9th Cir. Jan. 24, 1985), cert. denied, 472 U.S. 1028 (1985); see United States v. Waters, 146 IBLA 172, 184 (1998). In accordance with this authority we will undertake a de novo review of the case record to determine if Willsie has overcome the Government's prima facie case by a preponderance of the evidence.

Willsie testified that materials from the claims were tested for 4 or 5 years between 1976 and the early 1980's and the tests revealed "high grade" gypsum. (Tr. 417-18.) He stated that Southwest Minerals, "owned 100 percent by Ray Gerawan and myself," extracted gypsum from the claims in 1984, but ceased operations in 1985 because of financial problems and a lawsuit. (Tr. 422, 429, 438, 439.) Willsie stated that he intended to commence a mining operation on the claims in 1988 following settlement of the lawsuit in which he was declared the owner of the claims and that he had a company interested in leasing the claims, but that BLM "talked me out of letting them lease it." (Tr. 440; see Exh. C-22; Tr. 441-43.) Willsie identified a BLM employee who, he stated, told him that BLM "would prefer that I went ahead and got my patent for it" and that "they would expedite it for us, even." (Tr. 443.)

According to Willsie, he made money selling the gypsum to the cement industry. (Tr. 430, 432, 487.) Willsie said he investigated the possibilities of various markets in the 1980's, including bagged gypsum for agricultural markets and food grade filler. (Tr. 453.) Willsie stated that "if the market is out there, I'm sure going to go after it." (Tr. 490.) He thought that there was a big market out there but did not know in 1984-85 how big an operation he wanted. (Tr. 491, 495-96.)

Willsie was unsuccessful in his attempts to get a "brightness test" run on his gypsum (for the plaster market) and could not have broken into the "Georgia-Pacific Apex Market" for wallboard in 1984 because that market did not exist till 1987-88. (Tr. 499, 502.)

Willsie's principal witness, Gordon Austin, testified that he has a geological engineering degree from Montana Tech and a master's degree from George Washington University in engineering administration with a specialization in quantitative decision making. (Tr. 567.)^{9/} From 1986 until January 1996, Austin worked for the U.S. Bureau of Mines. He started out as a commodity specialist covering several commodities, gemstones, and

^{9/} Willsie's only other witness was Stull, who stated that she was a legal administrator with the law firm of Willsie's counsel. (Tr. 392.) She merely authenticated and offered testimony about the preparation of various exhibits offered by Willsie as evidence at the hearing. (Tr. 393-404.)

abrasive materials. In 1991, he became a group leader for certain commodities known as the refractories and abrasives. He also became the quartz crystal commodity specialist and the backup gypsum commodity specialist. In 1994, he assumed the position of commodities specialist for gypsum. (Tr. 568; Exh. C-25.) Prior to commencing work with the Bureau of Mines, he worked from 1985 to 1986 with Mid-American Development Corporation developing a plan for production of gypsum from a deposit in Utah, which included conducting extensive market studies. (Tr. 569-73.)

Austin commenced his testimony concerning marketability of gypsum from the claims with reference to a copy of pages 10-17 of the 1994 Mineral Report, which he had annotated. (Exh. C-26.) Those pages of the 1994 Mineral Report contain the Government's economic evaluation and operating costs based on the mining and processing scenario presented in the patent application. (Tr. 578-79, 657.) One of the items considered in the economic evaluation is the equipment necessary to extract and process gypsum.

Based on his experience, it was Austin's opinion that BLM's total cost of the processing equipment of \$988,300 for Willsie's proposed operation was high. He estimated such costs at \$335,500. (Tr. 586; see Exh. C-26; Tr. 579-85.) He also testified that BLM's construction cost estimate of \$48 per square foot for a 6,000-square-foot building for the site was much greater than his sources projected. "I checked with a couple of contractors who currently construct this kind of building. They tell me that they can construct a building of this size, Butler building-type construction, metal, tall enough to handle the equipment, over 10-inch reinforced concrete floor, for a cost of about \$10 a square foot, maximum." (Tr. 586-87.) Austin also found fault with BLM maintenance costs of \$112,500 per year for mining and primary crushing equipment. He stated that BLM cited two sources for such costs, both involving use costs for mining and construction equipment in the United States, but that the "bulk of the mining and construction equipment in the U.S. is used in very hard, very abrasive environments." (Tr. 588.) In contrast, he stated that gypsum is soft, not abrasive, and that costs would be much lower, in the range of \$2,000 per month or \$24,000 per year. Id. He did not use cost estimator sources to calculate costs, as BLM had done, he testified, because they are principally directed to the construction and hard rock mining industries and do not necessarily accurately reflect the cost for gypsum operations. (Tr. 679, 707.)

In Austin's opinion, gypsum from the claims could compete in the Victorville, California, cement market. When asked whether he knew the selling price for gypsum in that market, he responded: "I know the actual sales prices for each one of the companies in that area, and once again, that's proprietary information and for that reason in my analysis I accepted the BLM's -- the Bureau of Land Management's prices as they reported in the market to avoid propriety information." (Tr. 592.) He accepted BLM's estimate of \$20 per ton as "definitely a realistic price." (Tr. 593.) However, while BLM calculated estimated production and transportation costs to access that market to be \$19.33, Austin's figure was \$14.13. (Tr. 592; Exh. C-26.) He also testified that the gypsum from Willsie's claims could compete in cement markets in Utah, other markets in

California, and possibly Nevada. (Tr. 593.) He formed that opinion on the basis "of the availability to the markets of transportation, the ability to transport at a reasonable cost, and the ability to produce at a reasonable cost." (Tr. 594.)

Austin also testified concerning the market for bulk agricultural gypsum in Hanford, California. He accepted BLM's estimate of a market price of \$28 per ton, but he disagreed with BLM's cost estimate of \$28.08 per ton. He calculated cost of production and transportation as \$22.88. (Tr. 594; Exh. C-26.) In his opinion, gypsum from the claims could compete in that market, as well as other California markets, such as "Ochoa Valley, the Lucerne Valley and the Imperial Valley." (Tr. 595.) He stated: "All these markets are significant." Id. In addition, he stated that perhaps 60 to 70 percent of the total United States agricultural consumption of gypsum takes place in five western states: California, Nevada, Arizona, New Mexico, and Colorado, with the bulk of that consumption being in Arizona, Nevada, and California. (Tr. 595.)

BLM estimated the selling price for bagged gypsum for agricultural and filler in the Los Angeles area to be \$55 per ton, which Austin considered to be reasonable. (Tr. 596.) However, Austin found the cost of production and transportation to that market to be \$28.63, "significantly lower" than the \$39.82 per ton estimated by BLM. (Tr. 596; Exh. C-26.)

Regarding the wallboard market in Las Vegas, Austin testified that the cost of production and delivery of gypsum to the wallboard market would be \$6.23 per ton (\$1.38 per ton for production and \$4.85 per ton for transportation at 5 cents a mile for 97 miles). (Tr. 598.) Based on his knowledge of proprietary sale prices in the Las Vegas area, he testified that gypsum from the claims could compete in that market. (Tr. 599.) He also stated that gypsum from the claims could be used as a coal dust suppressant in coal mines, and he was aware of one mine in Price, Utah, approximately 290 miles from the claims, that had used gypsum in the past for that purpose. (Tr. 600-601.) He stated that there were 24 coal mines around Price, about half of which were south of Price, and, thus, closer to the claims. (Tr. 601.) He estimated production and transportation costs of approximately \$18 per ton for bulk gypsum which could sell for \$28 per ton, while costs for bagged gypsum would be close to \$25 per ton with sales being about \$40 per ton. (Tr. 600-602.)

Based on his experience, Austin provided a picture of the markets for gypsum that would have been available to Willsie in California, Nevada, Utah, and Arizona in 1984 and in 1995. He testified that the total demand for gypsum in the cement industry within the market from Willsie's claims in 1984 would have been a minimum of 328,560 tons and a maximum of 547,600 tons, increasing slightly by 1995 to 342,900 tons minimum and 571,500 tons maximum. (Tr. 605-606.) Based on his review of the assay reports in the case file, the gypsum from Willsie's claims would satisfy the quality requirements for the cement industry. (Tr. 606.)

For the wallboard industry, Austin testified that the gypsum from Willsie's claims would satisfy the quality standards for that industry.

and that in 1984 markets for gypsum from the claims would have been available in Arizona, Nevada, Utah, and Southern California for approximately 1,615,400 tons. (Tr. 611-12, 614; Exh. C-5 at 5.) ^{10/} For 1995, he estimated the market at 1,890,000 tons. (Tr. 614.)

In Austin's opinion, there existed an estimated 1,800,000-ton market for gypsum from Willsie's claims in 1984 for agricultural use and 2,220,000-ton market in 1995. (Tr. 615-16.) Austin stated that rock dust use in coal mines in Utah amounted to between 70,000 to 80,000 tons in 1984. Id. He testified that both limestone and gypsum are useful for that purpose with gypsum being most desirable due to its bright white appearance. (Tr. 617.) He did not have an estimate of the amount of rock dust used in 1995 "because the amount of rock dust used in the mine is based on the annual tons of production from underground mines, and I was not able to find Utah's 1995 production statistics." Id. The most recent year he could find was 1992 and, for that year, about 121,000 to 122,000 tons of rock dust were used. (Tr. 618.) However, he did not know how much of that was gypsum. Id.

Based on his review of both the 1994 and 1995 Mineral Reports, as well as his presence at the hearing during Kershaw's testimony, Austin testified that Kershaw did not display a current knowledge of the general markets for gypsum. (Tr. 620.) Specifically, regarding the 1995 Mineral Report, he stated:

[Kershaw] never revisited or reexamined the markets. He accepted the 95,000 tons as identified in the 1994 market as being complete and accurate, which it was not.

He then did the analysis of the wallboard market. Even though wallboard companies contract on an all or nothing basis, he split the market. And, furthermore, he limited the amount the supplier could supply based on production capacity, on processing capacity.

The wallboard material does not have to be processed. It's a load and go. And, by the same token, he did not do a detailed review. He did not do an analysis of the Utah cement market. He did not do a thorough analysis of the California cement market. In fact, he did not do an analysis within the market.

(Tr. 621.)

^{10/} The total given by Austin in this testimony and on Exhibit C-5 at 5 was 2,402,000 tons for the four states. However, he stated that Willsie could have competed in the California market only in Southern California. (Tr. 612.) He estimated that market to be approximately 55 percent of the total California market of 1,748,000 tons. Thus, we have calculated the Southern California market as 961,400 tons. Adding the other markets (409,000 tons for Arizona, 100,000 tons for Nevada, and 145,000 tons for Utah) results in a total market of 1,615,400 tons.

Moreover, Austin found fault with Kershaw's testimony regarding the handling and storage of overburden on the 40 acres of the claims recommended for patent. In Austin's opinion, based on his calculations of the overburden and nongypsum materials on the claims and taking into consideration the swell or increase in material size due to mining, nongypsum mined material would cover 26.8 acres to a height of 250 feet and you would not be able to mine anything under it. (Tr. 622-23.) He further testified that the processing areas, including the load out area, parking spaces, etc. would occupy approximately 5 acres. (Tr. 623.) Even assuming some sort of "a staged storage of the non-gypsum material on the plant site, you lose approximately half of the 40 acres. You lose 20 acres." (Tr. 623.)

Finally, when asked what amount of gypsum a prudent man would produce from the claims, Austin responded that a "first phase" operation, meaning the "first year, year and-a-half, two years," would be about 305,000 tons per year, while the "second phase" would reach additional markets, including the wallboard market, and expand to around 600,000 tons per year. (Tr. 624-26; see Tr. 704-705.)

Austin, who had not visited the claim site, conceded that marketability could be limited by "excess reserves." (Tr. 634, 637.) However, he did not believe that a visit to the site was necessary to form an opinion on the available markets, to determine production costs, or to determine the grades of gypsum on the claims. (Tr. 705.) With regard to "excess reserves," he felt that "excess reserves" would exist only if there was a true limit to the market. He did feel that reserves could be limited by "market penetrations, assumptions that someone shares a market." (Tr. 703.)

Willsie in this case characterized his projected operation provided in support of his patent application as an "example" of what he would propose to do on his claims. He testified at the hearing that he would attempt to enter any feasible markets and that he did not intend his "example" to be a limitation on his operation. BLM, on the other hand, apparently accepted Willsie's projected operation as a limitation on marketability. 11/

The testimony of Austin established a much larger market on the critical dates for gypsum from the claims than that analyzed by BLM. BLM offered no rebuttal witnesses to challenge Austin's testimony on markets. BLM's cross-examination of Austin did not undercut the strength of his testimony, which was grounded in his expertise of gypsum markets. While the

11/ BLM stated that "[t]he basis for the 135,000 ton annual production level is not BLM. It was Contestee's decision that discovery be analyzed pursuant to his December 14, 1988 proposal." (SOR at 21.) However, BLM also stated that it "did not arbitrarily limit Contestee to the 135,000 ton annual production level that Mr. Willsie proposed. Rather, the limits (other than plant capacity) on Contestee's operation were those set by applicable markets." (SOR at 19.)

conclusions of BLM's 1994 and 1995 Mineral Reports contemplated an operation producing, as Willsie had projected, 135,000 tons per year, Willsie's evidence shows that a prudent man could have produced more gypsum in 1984 and 1995 and entered more markets than projected by BLM. At the hearing, BLM admitted a market for gypsum existed at the times in question for more than 600,000 tons per year; however, it insisted that Willsie could only enter that market and supply 135,000 tons per year. BLM's position was that existing markets were being adequately supplied by existing sources.

As we have stated regarding marketability, a showing that merely establishes that a given market is receiving an adequate supply of the mineral in question to meet the demand is not a sufficient basis for concluding that supplies from another source are not marketable at a profit. United States v. Taggart, 53 IBLA 353, 357 (1981); United States v. Gibbs, 13 IBLA 382, 393 (1973); accord, Melluzzo v. Morton, 534 F.2d 860, 863 n.2 (9th Cir. 1976). In this case, Austin testified that the market for gypsum from these claims was several million tons per year in 1984 and 1995, and that over a period of years Willsie could penetrate that market by producing and selling approximately 600,000 tons of gypsum per year from his claims.

Although the Georgia-Pacific wallboard plant in Apex, Nevada, did not come on line until 1988 (Tr. 187), it is reasonable to assume that a prudent man would have anticipated a developing wallboard market in 1984 because of the increase in building demands in the regional markets available to the claims. Kershaw testified that the annual gypsum purchase for the Apex, Nevada, plant is 200,000 tons per year. (Tr. 187.) He limited Willsie's entry into that market to 40,000 tons per year because, combined with production of 95,000 tons per year for other markets, Willsie's projected production of 135,000 would be attained. The 135,000 production total, Kershaw believed, was the maximum production for the equipment Willsie proposed for his operation. (Tr. 188, 228, 230, 233.) ^{12/} On the other hand, when questioned on cross-examination regarding the limitations on the equipment Willsie had proposed in his patent application to use in his operation, Austin testified that "it would depend on which market you're selling to, but the equipment there could easily * * * [produce] 500,000 to 600,000 tons with multiple shifts." (Tr. 658.)

^{12/} With regard to his limitation of Willsie to 40,000-tons-per-year production for sale to the wallboard market, Kershaw explained that the 40,000-tons-per-year figure "was based on the production level of the plant that [Willsie] proposed in his mineral patent application, not the demand within [a 3 to 400-mile] radius [from the claims]." (Tr. 228.) Kershaw also limited Willsie's penetration of the cement market to 40,000 tons per year because "[a]gain, I would have to say [it was] the capacity of the plant that he proposed and that he supplied no information that he could supply a larger portion of that market." (Tr. 232.)

In addition, as recognized by BLM in the 1995 Mineral Report, the site of the claims in question is very favorable:

Additionally, the Willsie deposit is approximately 10 miles closer to those markets than Western Gypsum, which at 1989 transportation prices, would reduce transportation costs to the Las Vegas and California markets by \$0.50 per ton. This reduced transportation cost is an advantage over Western Gypsum that would allow Mr. Willsie to successfully enter these markets.

(Exh. G-18 at 16.) As Austin stated in response to a question concerning the importance of transportation costs in marketing gypsum, "[g]enerally, if it is not a mine mouth plant, where the plant and the mine mouth are one and the same, it is one of the major factors controlling the distance in which the material could be marketed." (Tr. 648.)

Regarding the costs of mining and processing, we are convinced that Austin has provided more reliable cost figures because of his greater knowledge of gypsum mining operations. Thus, we must conclude that Willsie's operational costs would have been lower than projected by BLM.

[9] As we have stated, in reviewing the evidence in a mining contest we must focus on what a prudent miner would do to obtain a maximum return and then judge whether this is sufficient to satisfy the prudent man standard, including the marketability component. Since the standard is objective, it does not depend on what the claimants actually planned to do. See United States v. Coleman, *supra* at 602; United States v. Rice, 73 IBLA 128, 140-41 (1983); United States v. Harper, 8 IBLA 357, 369-70 (1972). In applying that standard, we will assume "proper management" of the mining venture. See Converse v. Udall, 399 F.2d 616, 623 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

BLM's prima facie case proceeded on the theory that Willsie's proposed operation represented the actions of a prudent man seeking to enter and capture the market for 135,000 tons of gypsum in various markets utilizing equipment which could produce no more than that tonnage per year. However, that prima facie case was vulnerable to evidence that a prudent man would not so limit his operation and that he could produce more gypsum and market that production without increased costs for additional equipment. This is just the evidence produced by Willsie.

We must find, following our review of all the evidence, that Willsie has overcome BLM's prima facie case by a preponderance of the evidence establishing that the challenged portions of the C&W Nos. 12 and 16 are, in fact, mineral in character and that a discovery of a valuable mineral deposit of gypsum exists on both the C&W No. 1 and the C&W No. 15 mining claims.

BLM calculated that the 130 acres for which Willsie sought patent contained 32.5 million tons of gypsum. Accepting the evidence that Willsie could have commenced an operation on the critical dates leading to the production and marketing of 600,000 tons of gypsum per year, we conclude that he has established the validity of all 130 acres of the claims sought in his patent application, not just the 40 acres patented to him in 1996. Our conclusion is based on the fact that the valuable mineral deposits on those 130 acres would supply a 600,000-ton-per-year operation with reasonable reserves for a period of approximately 54 years.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the order appealed from is reversed and contest No. AZA-23448-1 is dismissed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge

